

Service Date: December 30, 2014

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF CenturyLink QC's) REGULATORY DIVISION
Service Quality and Its Response to Notice of)
Commission Action in Docket N2014.3.38,) DOCKET NO. D2014.11.91
Including Petition for Waiver of) ORDER NO. 7388
Admin. R. Mont. 38.5.337197)(b))

IN THE MATTER OF the Request of Staff)
of the Montana Public Service Commission) DOCKET NO. N2014.4.38
for CenturyLink Service Quality Information)

**ORDER DENYING CENTURYLINK'S MOTION FOR
PROTECTIVE ORDER**

Background

1. On March 18, 2014, the Montana Public Service Commission (Commission) staff sent a letter to Qwest Corporation doing business as CenturyLink QC (CenturyLink) requesting certain service quality information.

2. The information included: trouble reports by month by exchange for the latest two years available; repeat trouble reports by month by exchange for the latest two years available; trouble reports per 100 access lines by month by exchange for the latest two years available; out-of-service (OOS) tickets for each exchange; the number of OOS tickets cleared in 24 hours; and the percentage of OOS tickets cleared in 24 hours.

3. After reviewing CenturyLink's service quality information, the Commission issued a Notice of Commission Action (Notice) on August 26, 2014, ordering CenturyLink to file within 60 days of the Notice a plan to improve repair times.

4. On October 17, 2014, CenturyLink made an oral presentation to the Commission, which contained detailed service quality and personnel deployment information.

5. On October 23, 2014, CenturyLink filed its Motion for a Protective Order (Motion). On October 24, 2014, CenturyLink filed its Response to Notice of Commission Action, Request for Continuance, and Petition for Waiver. CenturyLink requested a continuance to comply with the Commission's Notice, and the Commission granted a continuance during a regularly scheduled work session on October 30, 2014.

6. CenturyLink requests a standard protective order issued pursuant to Admin. R. Mont. 38.2.5014 (2014) to protect trade secrets contained in the information presented to the Commission and also to protect the information that the Commission has requested CenturyLink to file.

7. The Commission noticed the Motion in the Regulatory Division Agenda.

8. No intervenor or member of the public commented on the Motion.

9. On November 13, 2014, a regularly scheduled work session was held to discuss and act on the Motion.

Discussion, Analysis, Findings, and Conclusions

10. A corporation seeking a protective order for materials filed with a regulating governmental agency must support its claim of confidentiality by filing a supporting affidavit making a *prima facie* showing that the materials constitute property rights which are protected under constitutional due process requirements. *Great Falls Tribune v. Montana Pub. Serv. Comm'n*, 2003 MT 359, ¶ 56, 319 Mont. 38, 82 P.3d 876. The claimant's showing must be more than conclusory. It must be specific enough for the Commission, any objecting parties, and reviewing authorities to clearly understand the nature and basis of the claims to the right of confidentiality. *Id.*

11. The Montana Supreme Court has ruled: "A non-human entity seeking protective orders or other protective measures for materials filed with a regulating governmental agency, such as the PSC, must support its claim of confidentiality by making a *prima facie* showing that the materials constitute property rights which are protected under constitutional due process requirements." *Great Falls Tribune* at ¶ 56.

12. The Commission has implemented the Court's ruling through amendment or repeal of administrative rules concerning protective orders. *See* Admin. R. Mont. 38.2.5001 – 5030.

13. If information is determined by a governmental agency or reviewing authority to

qualify as a property right in the form of a trade secret which warrants due process protection, secrecy can be preserved by the agency through reasonable means, including a protective order. *Great Falls Tribune* at ¶62.

14. “Trade secret” is defined by Mont. Code Ann. § 30-14-402 (2013), as “information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means, by other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

15. A party requesting a protective order based on trade secret must demonstrate that “(i) prior to requesting a protective order, the [party] has considered that the commission is a public agency and that there is a constitutional presumption of access to documents and information in the commission’s possession; (ii) the claimed trade secret material is information; (iii) the information is in fact secret; (iv) the secret information is subject to efforts reasonable under the circumstances to maintain its secrecy; (v) the secret information is not readily ascertainable by proper means; and (vi) the information derives independent economic value from its secrecy, or that competitive advantage is derived from its secrecy.” Admin. R. Mont. 38.2.5007(4)(b).

16. CenturyLink provided a supporting Affidavit with its Motion, as required by Admin. R. Mont. 38.2.5007(3)(c). See Aff. Robert Brigham (October 22, 2014).

17. In its Motion, CenturyLink states that it “understands and has fully considered the constitutional presumption in favor of public access to Information filed in MPSC proceedings.” Motion for Protective Order p.3 (June 5, 2014).

18. “‘Information’ includes knowledge, observations, opinions, data, facts, and the like, whether recorded or communicated in writing, orally, electronically, or otherwise, and whether provided through pleadings, reports, exhibits, testimony, work papers, or similar items are attachments to such items, or in response to discovery, subpoena, order, audit, investigation, or other request.” Admin. R. Mont. 38.2.5001(3). In its Motion, CenturyLink states that the material for which protection is sought “is comprised of knowledge, data and facts...” Mot. at p.3.

19. CenturyLink asserts that the information at issue is in fact secret and subject to

reasonable efforts to maintain its secrecy. In its Motion, CenturyLink states that the information is protected with a security protocol and that only employees and managers “with a direct need to know are authorized to access the Information.” Mot. at p.3-4.

20. CenturyLink asserts that its information is not readily ascertainable by proper means. “The information for which protection is sought is collected and tabulated by CenturyLink QC directly.” Mot. at p.4.

21. The final factor at issue in the trade secret analysis is whether the information that CenturyLink is seeking to protect derives independent economic value or a competitive advantage from its secrecy.

22. CenturyLink asserts that if the information is not protected, its “business competitors would be able to prioritize their marketing efforts and efficiently target specific customers or groups of customers in specific areas, based on CenturyLink’s service quality and personnel deployment to improve the likely success of their marketing efforts.” Mot. at p.4.

23. The Affidavit states that: “Possession of the Information for which protection is sought would give CenturyLink’s competitors a detailed view of (1) its performance on service quality metrics and (2) its deployment of technical personnel for each wire center in the state, which would provide these competitors with a distinct competitive advantage marketing to identified person or groups of persons in identified geographic areas of the state.” Aff. Brigham at p. 1.

24. CenturyLink has not provided sufficient information regarding the proposed proprietary material to warrant protection. As far as this Commission can ascertain, the information CenturyLink wishes to protect is “service quality metrics” and “personnel deployment by wire center.” First, this Commission has not protected aggregate service quality information in the past, only wire center information. CenturyLink does not indicate the service quality information is by wire center. Secondly, this Commission fails to understand how personnel deployment by wire center could lead to a competitive advantage, or exploitation of potential weaknesses in the CenturyLink network which would lead to a security risk for that network. In addition, the information presented during the closed meeting was a series of slides, each of which contained information, and that the information was broader and far more detailed than described in the Motion and Affidavit.

25. CenturyLink has not made a *prima facie* case demonstrating that the information

for which it seeks protection in its Motion for a Protective Order is in fact trade secret and subject to protection.

Order

THEREFORE, based upon the foregoing, it is HEREBY ORDERED as follows:

26. CenturyLink's Motion for Protective Order is hereby DENIED in its entirety.
27. CenturyLink must produce the information consistent with this Order within 14 calendar days of the service date of this Order.

DONE AND DATED December 2, 2014, by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

W. A. GALLAGHER, Chairman

BOB LAKE, Vice Chairman

KIRK BUSHMAN, Commissioner

TRAVIS KAVULLA, Commissioner

ROGER KOOPMAN, Commissioner

ATTEST:

Aleisha Solem
Commission Secretary

(SEAL)